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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

THE NEW YORKER MAGAZINE, INC.,

Appellant,

—v.—

LAWRENCE E. GEROSA, as Comptroller of the City of New York, and GEORGE M. BRAGALINI, as Treasurer of the City of New York,

Appellees.

APPEAL FROM THE NEW YORK COURT OF APPEALS

STATEMENT AS TO JURISDICTION

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APPEAL FROM THE NEW YORK COURT OF APPEALS

STATEMENT AS TO JURISDICTION

Appellant appeals from the judgment and remittitur of the Court of Appeals of the State of New York, entered on July 3, 1957, motion for reargument denied on October 17, 1957, which affirmed an order of the New York Supreme Court, Appellate Division, First Department, confirming a determination of the Comptroller of the City of New York denying appellant's claim for refund and assessing additional New York City gross receipts taxes for the years 1947, 1948 and 1949.

Opinions Below

The opinion of the New York Court of Appeals (Appendix A, *infra*, pp. 27-33) is reported at 3 N. Y. 2d 362. The

opinion of the Appellate Division (Appendix A, *infra*, pp. 33-40) is reported at 2 App. Div. 2d 600.

Jurisdiction

This is a proceeding under Article 78 of the New York Civil Practice Act to review determinations of the New York City Comptroller denying without opinion appellant's claims for refund of City gross receipts taxes for 1947, 1948 and 1949 and assessing deficiencies in such taxes for 1948 and 1949. The judgment of the New York Court of Appeals, affirming a final order of the Appellate Division which confirmed the Comptroller's determinations, was entered on July 3, 1957 (Appendix A, *infra*, pp. 40-41). Appellant's motion for reargument, filed on September 26, 1957, was denied on October 17, 1957 (Appendix A, *infra*, pp. 41-42). Notice of appeal was filed in the Supreme Court of the State of New York, New York County, on January 6, 1958.

The jurisdiction of this Court over this appeal is conferred by 28 U. S. C. §1257(2). Cases sustaining the jurisdiction of this Court on such appeal include *West Point Grocery Co.* v. *Opelika*, 354 U. S. 390; *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157; *Memphis Steam Laundry* v. *Stone*, 342 U. S. 389; *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307; *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250.

Questions Presented

1. Section 24-a of the General City Law of New York State authorizes any city with a population of a million or more to impose a privilege tax upon persons carrying on a trade, business or profession within the city measured by

gross receipts from such activity "received in and/or allocable to the City * * *." Pursuant to this enabling act, the City of New York enacted Local Law 14 of 1946 (amending Title RR, Chapter 41, Administrative Code) and Local Law 44 of 1948 (adding Title B to Chapter 46 of the Administrative Code). Acting under these provisions of the New York City Administrative Code and under his administrative regulations (p. 55, *infra*), the appellee Comptroller levied a tax on all of appellant's gross receipts from advertising in its magazine (excluding a small portion solicited by out-of-state offices, but including agency commissions and discounts never received by appellant), without allocation for appellant's preponderant out-of-state circulation, other substantial out-of-state activities, including printing and shipping, and out-of-state property. The first question presented is whether the foregoing State and City statutes, as thus interpreted and applied to appellant, violate the Commerce Clause of the United States Constitution.

2. Whether the State and City statutes, as interpreted and applied to appellant, violate the Due Process and Equal Protection Clauses of the United States Constitution (Fourteenth Amendment, §1) on any or all of the following grounds:

(a) Because appellant's gross receipts from magazine advertising are taxed in full while competing media—radio and television stations and other magazines—are taxed on only a portion of such receipts allocated to New York City.

(b) Because allocations of gross receipts taxable in New York are made for other businesses on grounds which are neither specified in the statutes nor justified by any factual differences from appellant, rendering the

denial of such an allocation to appellant arbitrary and capricious.

(c) Because, as the statutes have been construed and applied, they delegate power to the Comptroller of the City of New York, ostensibly guided by the requirements of the Commerce Clause, to effect discriminations against appellant and in favor of other taxpayers similarly situated without justification either in the Commerce Clause or on any other ground.

Statutes and Regulations Involved

Section 24-a of the New York State General City Law, New York City Local Law 14 of 1946, New York City Local Law 44 of 1948, and administrative regulations of the New York City Comptroller under the foregoing statutes are set forth or described in pertinent part in Appendix B, *infra*, pp. 43-57.

Statement

The facts, which are not in dispute, may be summarized as follows:

I. *Appellant's two editions, advertising and circulation.*

Appellant publishes a weekly magazine, The New Yorker, which has appeared since 1929 in two editions. One edition, known as the "city" or "metropolitan" edition, circulates in New York City and 26 neighboring counties in New York, Connecticut and New Jersey. The other, the "national" or "out-of-town" edition, circulates *outside* the area of the

city edition, i.e., to a minor extent in upper New York State but mainly in other parts of the United States and abroad.

The difference between the two editions consists mainly in the advertisements they carry. The bulk of all advertisements in the magazine is national in character. However, the city edition is designed to enable local advertisers to reach the comparatively small audience (see *infra*, pp. 5-6) in New York City and its metropolitan area at rates much lower than those for the vastly larger national edition. Coverage of the national market, including the New York metropolitan area, requires use of both editions, collectively described for purposes of advertising rates as the "entire edition."

Appellant's advertising business is the rendition to its advertisers of a service, i.e., the service of delivering the advertisers' messages to readers all over the world. The advertiser pays appellant for this service. Appellant induces the advertiser to purchase the service by showing the advertiser where throughout the world and to what types of readers his message will be delivered if printed in The New Yorker.

Revised periodically to reflect changes in circulation and other factors, the difference in rates for the "city" and "entire" editions is illustrated in the record by the following comparative charges on two dates for a full-page black and white advertisement:

	Entire Edition		City Edition	
	Guaranteed Circulation	Page Rate	Guaranteed Circulation	Page Rate
5 Oct. 1929	80,000	$ 700	50,000	$500
6 Jan. 1951	290,000	2,075	82,500	825

As these figures illustrate, advertising rates are based upon circulation. The publisher guarantees his circulation